NO. 240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 AND 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL.,
Petitioners,

v.

JEWEL TEA COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief as *amicus curiae* in support of petitioners' petition for a writ of certiorari. The consent

of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondent was requested but refused.

Only once before since the merged AFL-CIO came into being in 1955 has the Federation asked leave of this Court to file an *amicus* brief urging grant of a writ of certiorari. We do so again at this time for compelling reasons. The court below held that petitioner unions violated the Sherman Antitrust Act through a provision in their labor contract setting limitations on market operating hours. The issues posed by such a holding are highly significant in themselves. Even more important, the doctrine enunciated by the Court of Appeals carries with it profoundly disturbing implications for the whole institution of collective bargaining. In addition, this Court's previous undertakings to review at the forthcoming Term certain other decisions presenting related questions* make it urgent that the Court now have the benefit of the added illumination the instant case throws on the interconnected problems of managerial prerogatives, union-management bargaining duties under the labor relations law, and union liabilities under the antitrust laws.

Petitioners in their petition for a writ of certiorari are necessarily most concerned with these problems as they affect their own particular situation. The AFL-CIO is concerned with these problems as they affect the main body of the American labor movement. We desire to place before this Court a short outline of the Federation's reasons for believing that resolution by this Court of the issues raised

* See *Mine Workers* v. *Pennington*, 325 F. 2d 804 (6th Cir. 1963) (union's insistence upon standard wage clause in labor contract as antitrust violation), *cert. granted* May 18, 1964, pending in No. 48, October Term, 1964; *Fibreboard Paper Products Corp.* v. *NLRB*, 322 F. 2d 411 (D.C. Cir. 1963) (employer's duty to bargain regarding subcontracting), *cert. granted* 375 U.S. 963, pending in No. 14, October Term, 1964.

in the present case is essential for the continued effectuation of our national labor policy. A brief containing such a presentation is tendered with this motion.

Respectfully submitted,

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INTEREST OF THE AFL-CIO

This brief *amicus curiae* is tendered for filing by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the Motion for Leave to File a Brief as Amicus Curiae.

Affiliated with the AFL-CIO are national and international labor organizations representing about thirteen mil-

lion members. Millions of these employees are covered by collective bargaining agreements which, either as a result of joint negotiations between unions and multi-employer associations or as a result of "pattern" bargaining with certain market leaders, establish more or less standardized wages, hours, and working conditions in an industry or geographical area. The legality of these contracts might well be called into question under the principle espoused by the court below. Furthermore, the continued effectiveness of collective bargaining as an instrument for coping with the new and unprecedented labor problems created by a rapidly evolving technological society could be seriously jeopardized by any arbitrary, artificial limitation on the type of subject that may be dealt with through union-employer negotiations and agreements.

Concern about sustaining the validity of its affiliates' existing contractual arrangements, and concern about ensuring the future vitality of the whole collective bargaining process, give the AFL-CIO a direct and compelling interest in the outcome of the present litigation.

REASONS FOR GRANTING THE WRIT

1. This Court has already done much to mark out the boundary lines between federal and state substantive law and between court and agency jurisdiction in the field of labor relations. Where conduct is "arguably subject to §7 or §8" of the National Labor Relations Act, the courts, both federal and state, "must defer to the exclusive competence" of the NLRB, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245, unless the conduct also constitutes a breach of a collective bargaining agreement and is actionable under section 301 of the Taft-Hartley Act, *Smith* v. *Evening News Assn.*, 371 U.S. 195. In any nonviolent dispute, if the federal labor law is applicable, it prevails to the exclusion of state tort law, *Garmon, supra*, state contract law, *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S.

95, or state antitrust law, *Teamsters Local 24* v. *Oliver*, 358 U.S. 283.

The instant case presents additional critical questions on this perennial topic. Is conduct which is regulated by the National Labor Relations Act no longer subject to the exclusive primary jurisdiction of the Labor Board if the allegation is that the conduct violates the *federal* antitrust laws?[1] Even if a federal court has jurisdiction over such a suit, is the court under an obligation to read the federal labor law and the federal antitrust laws as a "harmonizing text" so as not to render union conduct which is lawful under the former unlawful under the latter? *Cf. United States* v. *Hutcheson*, 312 U.S. 219, 231, 236. To state these questions is to demonstrate the need for answers from this Court.

The Court of Appeals below held that petitioner unions violated the Sherman Antitrust Act by executing a labor contract with a grocers' association which included a clause limiting the hours for the sale of fresh meat from 9 a.m. to 6 p.m., Monday through Saturday. The respondent employer claimed it was forced by a union strike threat to agree to the same provision. As can readily be shown, the union either had the right under the federal labor law to insist on the clause in question to the point of an impasse in negotiations, or else was guilty of an unfair labor practice for which the employer was entitled to a Labor Board remedy.

The National Labor Relations Act expressly requires

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[1] There was no such thing as a union unfair labor practice when this Court in 1945 decided *Allen Bradley Co.* v. *IBEW Local 3*, 325 U.S. 797. That alone may caution against too ready a reliance on this decision as a touchstone in present-day union-management controversies. In addition, of course, *Allen Bradley* dealt with a restraint upon product competition, while, as discussed in the text, the instant case involves a matter of bargaining over "hours" and "other terms and conditions of employment" that is central to the regulatory design of the National Labor Relations Act.

unions and employers to bargain over "hours" and "other terms and conditions of employment." 61 Stat. 141-42, §§ 8(a)(5), 8(b)(3), 8(d) (1947), 29 U. S. C. §§ 158(a)(5), 158(b)(3), 158(d). The NLRB has long held that this encompasses a duty to bargain over working schedules and reductions in the job content of the bargaining unit. *Timken Roller Bearing Co.*, 70 NLRB 500, 504 (1946).[2] See also *Town & Country Mfg. Co.*, 136 NLRB 1022 (1962), *enforced* 316 F. 2d 846 (5th Cir. 1963). A meat department's operating hours would seem so integral a function of the work schedules and job content of the butchers as necessarily to be embraced within the same duty to bargain. *Cf. Teamsters Local 24* v. *Oliver*, 358 U.S. 283, 293-94. But in any event this presents an issue for Labor Board determination. If the marketing hours were a mandatory subject of collective bargaining, the union's insistence on them would have been lawful; if they were not, the union's insistence would have amounted to an unlawful refusal to bargain. See *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349.

In the past this Court has recognized the need, in federal-state relations, of "delimiting areas of potential conflict *** of rules of law, of remedy, and of administration," with the "unifying consideration" of decision being "regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency." *Garmon*, 359 U.S. at 242. We suggest that where particular conduct falls within the regulatory scheme of the National Labor Relations Act, the administration of national labor policy by the designated federal agency might be as much imperilled through the regulation of such conduct by the federal courts applying the federal antitrust

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[2] *Enf. den. on other grounds* 161 F. 2d 949 (6th Cir. 1947); cited with approval by this Court in *Teamsters Local 24* v. *Oliver*, 358 U.S. 283, 295. See also *Railroad Telegraphers* v. *Chicago & North Western R. Co.*, 362 U.S. 330 (ban on abolition of jobs a bargainable issue under the Railway Labor Act).

laws as through its regulation by state courts applying state tort, contract, or antitrust law. At any rate, it is essential for this Court to lay down the ground-rules to govern the separate roles of, or the allowable interplay between, the federal labor laws and the federal antitrust laws.

2. Apart from any questions about the impact of the labor relations laws, the decision of the Court of Appeals below presents the most serious questions regarding the interpretation of the antitrust laws and the extent of union immunity from those laws.

As long ago as *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495, 497, 500, 503-04, this Court made clear that only restraints on "commercial competition" were the target of the antitrust laws, and that "an elimination of price competition *based on differences in labor standards* • • • has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act." (Emphasis supplied.) Labor standards have traditionally embraced hours of work no less than rates of pay.[3] The trial court found that the limitation on marketing hours in this case was fashioned by the union exclusively for the purpose of serving the employees' interest in the hours worked, work

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[3] See, *e.g.*, 1 Commons et al., *History of Labor in the United States* 536 ff. (1918); 2 id. at 96 ff., 509-10; Rayback, *A History of American Labor* 181-84 (1959). See also *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 504, n. 24: "Federal legislation aimed at protecting and favoring labor organizations and eliminating the competition of employers and employees based on labor conditions regarded as substandard, through the establishment of industry-wide standards both by collective bargaining and by legislation setting up minimum wage *and hour standards*, supports the conclusion that Congress does not regard the effects upon competition from such combinations and standards as against public policy or condemned by the Sherman Act." (Emphasis supplied.) In the contemporary bargaining scene, labor economist Lloyd Reynolds has found that "[m]ost contracts also regulate the *times of the day and week* during which the standard hours are to be worked." Reynolds, *Labor Economics and Labor Relations* 221 (3d ed. 1959). (Emphasis supplied.)

performed, and wages received (R. 672-73). Despite this, the Court of Appeals declared that marketing hours were solely a matter for managerial determination, not a condition of employment, and that union-induced restrictions on them were an unlawful restraint of trade. We regard this as directly contrary to the philosophy of *Apex*.

Whatever the end sought by a union, however, that in itself does not suffice to establish the union's liability under the antitrust laws. A labor organization runs afoul of the Sherman Act only where it acts to restrain trade "in combination with business groups • • • which are directly interested in destroying competition." *Allen Bradley Co.* v. *IBEW Local 3*, 325 U.S. 797, 810-11. See also *United States* v. *Hutcheson*, 312 U.S. 219, 232. For the trial court, the record here was "devoid of any evidence to support a finding of conspiracy" (R. 670, 683-84, 658). The Court of Appeals swept past this factual finding by holding the collective bargaining agreement itself constituted the conspiracy. Wholly ignored was this Court's assumption that even the restrictive agreement in *Allen Bradley* "standing alone would not have violated the Sherman Act." 325 U.S. at 809.

Put simply, then, the issues are (1) whether a clause in a labor contract aimed at defining the employees' working hours can be treated as the type of restraint on "commercial competition" which falls within the ambit of the Sherman Act; and (2) whether the indispensable finding of a business combination in restraint of trade can be predicated solely upon a union-sought clause in a collective bargaining agreement with a multi-employer association, in the absence of any independent evidence of an employer conspiracy in which a union has joined. The court below in effect answered both questions in the affirmative. In so doing it bore grim testimony to the perceptiveness of Columbia Law School Professor Michael Sovern's recent warning that "under the guise of applying *Allen Bradley*,

the courts could conceivably grab back a considerable measure of the power taken from them by the Clayton and Norris-LaGuardia Acts."[4]

That is where the road taken by the Court of Appeals necessarily leads. The core of the decision below is that marketing hours are "not a condition of employment" because "whether fresh meats are to be sold after 6 P.M. depends upon the convenience and requirements of the people living within shopping distance of the place of business"; determinations of the "hours of employment for the butchers to supply meat to customers are the prerogatives of the employer." *Jewel Tea Co.* v. *Associated Food Retailers*, 331 F. 2d 547, 549 (7th Cir. 1964). The Court of Appeals consulted its catalogue of meritorious social objectives, and found a union's supposed interference with convenient shopping hours not included. Thus would it open a new chapter in the long, sorry tale which we thought had come to an end when this Court uttered its strictures against "any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *United States* v. *Hutcheson*, 312 U.S. 219, 232.

There is no need to recount the proven inadequacies of past judicial regulation of union conduct via the antitrust laws.[5] It is therefore imperative that this Court review this latest, and potentially far-reaching, theory whereby the judiciary could once again become the arbiter of socially acceptable labor activity.

3. The implications of the decision below extend much beyond the present case. In today's world, employee combinations to restrain "competition among themselves in the

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[4] Sovern, "Some Ruminations on Labor, the Antitrust Laws and *Allen Bradley*," 13 Lab. L. J. 957, 962 (1962).

[5] See generally Frankfurter and Greene, *The Labor Injunction* 200 (1930); Witte, *The Government in Labor Disputes* 61-74 (1932); Cox, "Labor and the Antitrust Laws—A Preliminary Analysis," 104 Univ. Pa. L. Rev. 252, 265 (1955).

sale of their services to the employer," which according to this Court are not the concern of the antitrust laws, *Apex Hosiery*, 310 U.S. at 502, require for their effectuation more or less standardized labor contracts in an industry or geographical area. These are generally secured either through bargaining with multi-employer associations or through bargaining with market leaders that sets a "pattern" for agreements with other firms. Both methods might be called into question under the reasoning of the Court of Appeals.

Between 80 and 100 percent of the workers under union agreement are covered by multi-employer contracts in such important industries as men's and women's clothing, coal mining, building construction, hotels, longshoring, maritime, trucking, and warehousing. Between 60 and 80 percent of unionized workers are under multi-employer pacts in baking, book and job printing, canning and preserving, textile dyeing and finishing, glass and glassware, malt liquor, pottery, and retail trades. Professor Lloyd Reynolds of Yale, after citing these figures, adds: "There seems also to be a clear tendency for the proportion of unionists covered by multi-employer agreements to increase over the course of time."[6] Furthermore, in some other major industries relatively uniform terms of employment are obtained through the negotiation of a contract with one leading employer and the subsequent acceptance of that contract's key provisions, with only minor modifications, by the other employers in the industry.[7]

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[6] Reynolds, *Labor Economics and Labor Relations* 170 (3d ed. 1959).

[7] See Chamberlain, *Collective Bargaining* 275 ff. (1951). The steel industry until recently supplied a classic example of pattern bargaining. Now negotiations partake more of the nature of multi-employer bargaining, with the union and a committee representing the larger producers agreeing on an "economic package" and certain other critical terms of employment, which are then incorporated into the various individual labor contracts. See 45 LRRM 11-20 (1960); 49 *id.* 13-19 (1962).

The ruling below would thus hamstring widespread, increasingly used bargaining procedures, at least whenever bargaining ventured into an area thought by a court to involve a "managerial prerogative" and not a "condition of employment." But such categories are not static. As labor economist Neil Chamberlain has observed: "With changing economic, social and political relationships, issues which were once of no concern to the workers because presumably beyond their control or not immediately affecting their welfare become of direct interest, with the possibility of control discovered or created." [8]

The NLRB, in another context, also has emphasized that in "an evolving industrial complex," collective bargaining questions must be approached with an awareness they "are being affected by automation and technological changes and other forms of industrial advancement." See *American Cyanamid Co.*, 131 NLRB 909, 911-12 (1961). Solving the new and unprecedented labor problems arising in this dynamic situation demands of collective bargaining the utmost creativity and flexibility. Yet the Court of Appeals below would freeze today's bargaining in yesterday's outworn mold. If the central institution of American labor relations is to meet the challenge of changing times, this Court must see that it is not thwarted by anachronistic notions of federal law.

In *Mine Workers* v. *Pennington*, No. 48, October Term, 1964, the Court already has before it a case in which the lower federal courts grounded an antitrust violation in part on a union's insistence upon a standard wage clause in a labor contract.[9] The present case, with its different but closely analogous facts, would shed valuable additional

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[8] Chamberlain, *Collective Bargaining* 333 (1951).

[9] The Court will also review, in *Fibreboard Paper Products Co.* v. *NLRB*, No. 14, October Term, 1964, an important Labor Board ruling regarding the scope of an employer's bargaining duty.

light on the dimensions of the issues in *Pennington*. This is especially true because the varying results in the trial courts in these two cases would enable this Court to view the questions raised with a sharper appreciation of their implications in terms of both the law to be applied and the latitude to be allowed the fact-finder. We respectfully suggest that the two cases ought to be argued and considered together.

CONCLUSION

For the foregoing reasons, and for the reasons set forth by petitioners in their petition, a writ of certiorari should be granted, and the case should be set down for argument in conjunction with *Mine Workers* v. *Pennington*, No. 48, October Term, 1964.

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